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In the Supreme Court of the United States

OCTOBER TERM, 1972

No. 72-898

CHARLES LAURENT FIOCCONI AND
JEAN CLAUDE KELLA, PETITIONERS

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINIONS BELOW

The court of appeals affirmed petitioners' convictions without opinion. The opinion of the court of appeals affirming the district court's denial of a writ of habeas corpus (339 F. Supp. 1242) is reported at 462 F. 2d 475.

JURISDICTION

The judgment of the court of appeals was entered on November 28, 1972. The petition for a writ of certiorari was filed on December 18, 1972. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTIONS PRESENTED

1. Whether the United States District Court for the Southern District of New York had jurisdiction to try petitioners for narcotics offenses when they had been extradited from Italy on an indictment filed in the District of Massachusetts charging other narcotics offenses.

2. Whether the evidence was sufficient to sustain petitioners' conviction.

3. Whether the trial court's instructions were proper.

4. Whether the trial court's ruling on the admissibility of evidence denied petitioners a fair trial.

STATEMENT

1. In November 1969, petitioners, citizens of France, were indicted in the United States District Court for the District of Massachusetts for having conspired from September 1968 to April 1969 to import heroin into the United States in violation of 21 U.S.C. (1964 ed.) 174. Bench warrants were issued but could not be executed. Interpol found petitioners in Italy and Italian authorities arrested them there in August 1970.[1] A month later the United States Embassy in Rome requested petitioners' extradition. Although the 1868 Extradition Convention between the two governments (15 Stat. 629, as amended) does not include narcotics offenses, the Embassy sought extradition as an exer-

[1] When arrested, petitioners gave false names and false passports to the Italian authorities; for this offense they were convicted in Italy and sentenced to five months' imprisonment. 339 F. Supp. at 1244.

cise of comity since the Convention does not preclude extradition for narcotics offenses and since petitioners' acts, as alleged in the indictment, would be crimes under Italian law. After appropriate proceedings, a court in Florence directed petitioners' extradition for the purpose of standing trial on the Massachusetts charges. 462 F. 2d at 476–477.

After being removed to Boston on October 6, 1971, petitioners pleaded not guilty.[2] Pre-trial bail was fixed at $250,000 each, and was met by a surety bond secured by a certified check for $500,000 drawn on a Swiss bank. Shortly after their release on bail, petitioners were subpoenaed to appear before a federal grand jury in the Southern District of New York. When they appeared they were arrested on warrants issued under an indictment returned the same day, which charged them with a substantive crime involving the sale and concealment of heroin on May 27, 1970. Bail was fixed on those charges at $100,000 each, which petitioners were unable to post. Subsequently, the grand jury returned a superseding indictment charging petitioners and twenty-one others with having conspired to violate the narcotics laws from January 1970 to January 1972 (the date of the indictment), and with two substantive offenses in May 1970. Bail was again set at $100,000, and petitioners were still unable to meet it. 462 F. 2d at 477.

Petitioners then sought a writ of habeas corpus from the United States District Court for the South-

[2] Petitioners later pleaded guilty and on October 24, 1972, were sentenced to nineteen years' imprisonment: these sentences were subsequently reduced to fifteen years.

ern District of New York, contending that their detention there on a charge other than the one for which they had been extradited was an act of bad faith under international law, depriving the district court of jurisdiction over them and requiring their release, citing *United States* v. *Rauscher,* 119 U.S. 407. The district court denied the petition on March 16, 1972, 339 F. Supp. 1242; the court of appeals affirmed, 462 F. 2d 475; and this Court denied certiorari on December 11, 1972, No. 72-332.

2. In the meantime petitioners had been convicted on May 24, 1972, after a jury trial in the United States District Court for the Southern District of New York, of importing and selling 37 kilograms of heroin, and conspiring to commit this offense, in violation of 21 U.S.C. (1964 ed.) 173, 174. They were sentenced to twenty-five years' imprisonment (concurrent five-year terms on the substantive offenses to run consecutively with a twenty-year term for the conspiracy violation).[3]

3. The evidence at trial showed that petitioners were the ringleaders of an international conspiracy which smuggled vast quantities of heroin into the United States and distributed it.

During April 1970, petitioner Fiocconi, whom co-defendant Berdin knew and identified at trial as "Charlot" (Tr. 58-59), and several of his "lieutenants," met with Berdin in France and convinced him to invest money in a heroin smuggling operation, and

[3] Twenty-one co-defendants were severed from the trial for various reasons.

to try to find new methods and new couriers for Fiocconi's operation (Tr. 41–48, 57–60).

After being told that the shipper would receive $1,000 plus expenses, for each kilogram of heroin delivered to the United States, Berdin recruited co-defendant Labay, another Frenchman, who purchased a Bentley in which they hid 37 kilograms of heroin belonging to Fiocconi (Tr. 48–55, 61–62, 78). At the end of April 1970, Fiocconi arranged a meeting with Berdin in Paris (Tr. 58, 60). Fiocconi asked Berdin whether he trusted Labay; Berdin assured him that the smuggler would cause "no problems." Fiocconi then told Berdin that he would be contacted in the United States at the United Nations building (Tr. 59–60).

On May 27, 1970, the Bentley, with heroin hidden in it, arrived in New York City aboard the Queen Elizabeth II (Tr. 328–332). After the car passed through Customs, Labay, who had previously arrived in New York, removed the heroin and gave it to Berdin (Tr. 83–86). Berdin then met with co-defendant Dumerain, one of petitioner Kella's lieutenants (Tr. 88–90). Berdin turned the drugs over to Dumerain, who paid Berdin $2,000 expense money and $37,000 for importing the 37 kilograms of heroin (Tr. 90–91). The next day, Berdin met Dumerain as planned at the Hotel Pierre, where he was introduced to Kella (Tr. 95–96). At dinner that evening, Berdin told Kella that Labay was dissatisfied and wanted $2,000 per kilo. Kella rejected the request, commenting: "No, we give him the regular price. If he is not happy, throw him away, we don't need him" (Tr. 98).

At the end of June 1970, Labay again smuggled heroin into New York City, this time concealing the drugs in a Lancia automobile shipped to this country aboard the S.S. France (Tr. 104, 106, 338–339). Labay gave Berdin 3 or 4 suitcases of heroin (Tr. 105–108), which he took to an apartment in Brooklyn, New York, rented by Cleo Kathleen Bennett, Kella's girlfriend (Tr. 109–112, 135, 152). There codefendant Signoli, who complained that one kilo was missing from the 70 kilo shipment, paid Berdin approximately $70,000 for the heroin (Tr. 113–115).

Cleo Bennett testified that during June or July 1970, she flew with Kella to Brussels, where they were met at the airport by Fiocconi. Fiocconi and Kella greeted each other with a hug and a kiss and, while Miss Bennett remained in an airport restaurant, walked off in conversation (Tr. 369–371). When Kella returned alone, he and Miss Bennett flew to Paris and then to Casablanca, where they again met Fiocconi and codefendant Vanverberghe with whom they stayed for approximately four days (Tr. 371–374).

In August 1970, Berdin met Signoli and codefendant Andreani at a bar in New York (Tr. 121–122). Signoli told Berdin that Labay had shipped a third automobile (a Mercedes) to New York City and that Andreani was replacing him because Berdin had failed to follow the instruction that he was not to spend too much money in New York. Thereafter, Berdin met with Signoli and Andreani and was given approximately $72,000 for Labay (Tr. 129–132).

Before Berdin left for France, codefendant Randell contacted him and arranged to meet him in Brooklyn (Tr. 132–133). Randell arrived at the meeting with a French girl and all three went to the apartment of Cleo Bennett, petitioner Kella's girl friend. There, Randell gave Berdin and the French girl approximately $200,000 each to take back to France (Tr. 133–136). Berdin and the girl then went to Kennedy Airport and flew to Brussels (Tr. 136–138).

In Brussels, Berdin delivered the money and then returned to Paris, where he met codefendant Scapula who gave him an envelope containing $50,000, which represented his share of the proceeds from the three smuggling operations (Tr. 138–139). When Berdin complained that he had been cheated, Scapula agreed that he had not been dealt with fairly and produced another envelope, which he said contained a lot of money and represented Fiocconi's and Kella's shares (Tr. 140).

At trial, traces of heroin found in the Bentley and in the Mercedes were received in evidence (Tr. 529–541; G. Ex. 57, 57A, 58A, 58B). The government also sought to introduce two half kilo bags of heroin (G. Ex. 55, 56) found by a customs officer on May 11, 1972, still hidden in the Lancia (Tr. 506–513, 520–523). At the conclusion of the government's case, the trial court ruled that there was insufficient evidence of ownership or possession of the Lancia between July 1, 1970, when the car arrived in New York, and March 1971, when the automobile was purchased at

an auction (Tr. 481–482). Therefore, the court granted petitioners' motion to strike the two half kilo bags of heroin and the testimony of the government's chain-of-ownership witnesses (Tr. 655). The court, which denied petitioners' motion for a mistrial, instructed the jury to disregard that heroin (Tr. 656, 658). The court also granted petitioners' motion to strike, and instructed the jury to disregard two pages of Miss Bennett's direct testimony on the ground that the inferences to be drawn were too speculative (Tr. 655–656). That testimony related to Miss Bennett's meeting Fiocconi's girl friend in Paris in July 1970, and accompanying her when she took an attache case into a bank and left it there (Tr. 383–384).

In a pre-trial motion and again at trial after the government and Fiocconi rested, Kella requested the court to take judicial notice of the fact that petitioners had been arrested and incarcerated in Italy in August 1970 (Tr. 659–660). The court denied the motion but noted that there were witnesses with personal knowledge who were available to testify on that subject. Petitioner Kella, however, like Fiocconi, rested without calling any witnesses, or presenting any evidence (Tr. 660–661).

ARGUMENT

1. Petitioners renew their claim, more fully presented in their prior petition to this Court, No. 72-332, certiorari denied, December 11, 1972, that their trial in the United States District Court for the Southern District of New York was an act of bad

faith under international law, rendering that court without jurisdiction and requiring their release. For this result they rely on *United States* v. *Rauscher*, 119 U.S. 407.

The district court rejected this contention on the ground that *Rauscher* applied only to extradition according to treaty, while the instant case involved extradition under the principle of comity, and that "[a]bsent a treaty or law which limits jurisdiction, a court may try a defendant for any crime for which he has been properly indicted," as this Court held in *Ker* v. *Illinois*, 119 U.S. 436. See 339 F. Supp. at 1246.

On the other hand, the court of appeals thought the district court, although reaching the correct result, had read *Rauscher* too narrowly. To the court of appeals, the question whether petitioners were entitled to relief under *Rauscher* depended on "whether the surrendering state would regard the prosecution at issue as a breach" (462 F. 2d at 480). Since the New York charges, although relating to a period subsequent to that covered by the Massachusetts indictment, were of the "same character as the crime for which [petitioners] were extradited," the court held that, absent an affirmative protest from Italy, comity had not been breached (462 F. 2d at 480–482).

The issue petitioners seek to raise in this Court is whether the district court had jurisdiction to try them; in light of all the information presently available, however, there is no basis for concluding that the Italian government considers petitioners' New York

trial a breach of good faith. Certainly there was no objection from the Italian government at the time of trial, nor any hint of an objection in the interim. In the absence of such an objection, the New York prosecution involves no international law implications, regardless of whether these issues would in any event be matters for the courts; certainly there is no ground for retroactively depriving the district court of jurisdiction it has already lawfully exercised in view of the situation at the time.[4]

As we pointed out in our Memorandum in Opposition in No. 72-332, the United States Embassy in Rome was informed on October 4, 1972, that the Court of Appeals in Florence had approved an extension of extradition to include the New York offenses, although this decision has now been appealed by petitioners to the Court of Cassation. We are aware of no further developments in the proceedings in Italy.[5]

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[4] Even if a later objection by the Italian government, which seems unlikely, would have a retroactive effect on the district court's jurisdiction, this is not a reason for the Court to hold this case pending a final, official decision by the Italian authorities. Petitioners are lawfully incarcerated under their 15-year sentences for the Massachusetts offenses. If at some time in the future the Italian government does protest the New York prosecution, petitioners will have other remedies to pursue on the question whether such an objection affects the validity of their New York sentences.

[5] We are informed by the Department of State that the American Embassy in Rome advised on March 2, 1973, that the "matter [is] still pending in Italian Supreme Court of Cassation." If there are any developments while the case remains on this Court's docket, we shall promptly submit a supplemental memorandum so advising the Court.

Nevertheless, we believe there is no reason for the Court to hold this case pending action by the Italian authorities and that further review regarding the extradition issue is not warranted. Even assuming *arguendo* the continuing validity of *Rauscher*, about which the court of appeals expressed some doubt in light of developments in international and domestic law and practice over the last century, see 462 F. 2d at 477–478, we believe that both courts below correctly concluded that the district court had jurisdiction to try this case. Both courts noted the similarity between the crimes charged in the New York and Massachusetts indictments and the improbability that Italy would consider it a breach of faith for the United States to have tried petitioners on the New York charges. 462 F. 2d at 481; 339 F. Supp. at 1247.

2. Petitioners claim that there was insufficient evidence to support their convictions. As the Statement indicates, codefendant Berdin, the government's principal witness whose story was corroborated and uncontroverted, supplied ample direct evidence that the petitioners, with whom he conspired, did knowingly conspire and smuggle thirty-seven kilograms of heroin into the United States.

3. Petitioners' contention that the trial court instructed the jury that they could base a finding of petitioners' guilt solely upon proof of their aiding and abetting the importation of the heroin ignores the four pages of jury instructions (Tr. 744–748) preceding the trial court's aiding-and-abetting instruction wherein the court carefully instructed the jury

about all the elements of each crime that the government was required to prove. Viewed in context, the trial court's aiding-and-abetting instruction only served to inform the jury that the government was not required to prove actual physical handling of the heroin by each petitioner (Tr. 748).

Petitioners rely on *United States* v. *Jones*, 308 F. 2d 26, 32–33 (C.A. 2), but *Jones* did not hold that proof of aiding and abetting can never support a conviction under 21 U.S.C. 174. Rather, *Jones* required that where no actual possession was proven, the government could not rely on an inference of knowledge of illegal importation but must independently prove such knowledge. Here, the trial court repeatedly instructed the jury that, as an element of each substantive offense, the government must prove to the jury's satisfaction that each petitioner acted willfully and knowingly (Tr. 726, 744–748).

4. Petitioners contend that they were prejudiced by the admission of evidence subsequently withdrawn from the jury's consideration and by the trial court's refusal to take judicial notice of the dates of their foreign incarceration.

At trial, the evidence from the Lancia automobile and Miss Bennett's testimony about the errand she performed with Fiocconi's girlfriend were both conditionally admitted into evidence, subject to additional proof of their relevancy and connection with peti-

tioner's heroin smuggling (Tr. 384, 461, 523, 656). After ruling at the conclusion of the government's case that sufficient proof of relevancy had not been shown, the trial court instructed the jury to eliminate from their consideration, any evidence or chain-of-custody testimony involving the Lancia automobile or the two bags of heroin found in the Lancia, and Miss Bennett's testimony about her errand with Fiocconi's girlfriend (Tr. 655–658). This instruction was adequate under the circumstances; in addition, there was other competent evidence of Miss Bennett's travels with Kella (Tr. 369–374) and of heroin found in automobiles shipped to New York City by the petitioners (Tr. 529–541), so that petitioners were not prejudiced by the conditional admission of this evidence.

The trial court was not presented with anything other than counsel's averment that petitioners were incarcerated in Italy on August 6, 1970. We note that such incarceration in no way affected the evidence of petitioners' prior participation and leadership in their heroin smuggling efforts. Since the trial court offered to allow counsel to call readily available witnesses for the limited purpose of establishing the facts of petitioners' foreign incarceration, a fact not otherwise commonly known, petitioners suffered no prejudice when the court properly refused to take judicial notice of their bare averments.

CONCLUSION

It is therefore respectfully submitted that the petition for a writ of certiorari should be denied.

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